Supreme Court, U.S.
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No. 01-756

In The
Supreme Court of the United States

REGAL FISH LTD., PETITIONER

v.

JEFFREY P. FISH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE INTERNATIONAL GROUP OF PROTECTION AND INDEMNITY CLUBS, AMERICAN INSTITUTE OF MARINE UNDERWRITERS, THE CHAMBER OF SHIPPING OF AMERICA AND THE INTERNATIONAL COUNCIL OF CRUISE LINES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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26 pp

QUESTION PRESENTED

Whether an injured seaman may recover prejudgment interest on a damages award under the Jones Act, 46 U.S.C. App. § 688(a), even though this Court has held that the Jones Act incorporates the substantive law of the Federal Employers' Liability Act, which this Court held in *Monessen Southwestern Railway Co.* v. *Morgan*, 486 U.S. 330 (1988), does not permit courts to award prejudgment interest.

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INTEREST OF THE AMICI CURIAE[1]

The International Group of Protection and Indemnity Clubs (the P&I Clubs) consists of nonprofit, mutual insurance companies which insure the liabilities of their shipowner members. Together, the P&I Clubs insure the liabilities of over 95% of the world's ocean-going merchant fleet, including virtually all oil tankers and dry cargo ships trading to the United States. The P&I Clubs are linked by reinsurance arrangements covering the larger liability risks of shipowners throughout the United States and the rest of the world. See generally G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 76 (2d ed. 1975). They actively participate in handling claims for their shipowner members, including the appointment of lawyers, surveyors, and other experts, and the expeditious settlement of claims of all types, including those by seaman seeking recovery under the Jones Act, 46 U.S.C. App. § 688(a). Over the years, the P&I Clubs have participated as *amici curiae* in cases before this Court, most recently *United States* v. *Locke*, 529 U.S. 89 (2000); *Yamaha Motor Corporation* v. *Calhoun*, 516 U.S. 201 (1996); and *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 529 (1995).

The Chamber of Shipping of America represents twenty-one U.S.-based companies that own, operate, or charter ocean-going tankers, container ships, and other merchant vessels engaged in both domestic and

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[1] Pursuant to this Court's Rule 37.6, undersigned counsel represents that no counsel for any party had any role in authoring this brief, and no persons or entities other than the *amici curiae* made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court.

international trade. The Chamber also represents other entities that maintain a commercial interest in the operation of such ocean-going vessels. As a member of the International Chamber of Shipping, the Chamber participated as *amicus curiae* in *United States* v. *Locke*, *supra*.

The American Institute of Marine Underwriters (AIMU) has over a century of service as the trade association representing the marine insurance industry as an advocate, educator, and center for education. The AIMU represents approximately 90 percent of the commercial marine insurance companies in the United States. It routinely participates in a broad array of advocacy forums before lawmakers, regulators, and international bodies. AIMU has participated as *amicus curiae* in *California* v. *Deep Sea Research*, 523 U.S. 491 (1998); *Argentine Republic* v. *Amerada Hess Shipping Corporation*, 488 U.S. 428 (1989); and *M/V Sky Reefer*, *supra*.

The International Council of Cruise Lines is a domestic non-profit membership association that includes the largest passenger cruise lines operating in excess of eighty vessels that call on hundreds of ports in the United States and abroad. ICCL members employ thousands of seamen and call on major U.S. ports in Florida, Alaska, California, Louisiana, New York, Texas, and Massachusetts. Those ports are in States within the geographical boundaries of the courts of appeals that conflict over whether the Jones Act permits prejudgment interest. The ICCL has participated as *amicus curiae* in cases at the certiorari stage in this Court. A precursor to the ICCL, the International Committee of Passenger Lines, participated as *amicus curiae* in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991).

Together, the *amici* represent a substantial portion of

the insurance-related and shipowning interests that pay claims to injured seamen under the Jones Act. As such, they have a vital interest in the proper construction of that Act.

STATEMENT

Respondent was injured during the course of his employment on a fishing vessel owned and operated by petitioner. He subsequently filed this admiralty action in federal district court, seeking personal injury damages under the Jones Act, 46 U.S.C. App. § 688(a), damages for unseaworthiness under the general maritime law, and maintenance and cure under the general maritime law.

The district court rendered a split judgment. Pet. App. B8-B9. The court upheld respondent's claim for damages under the Jones Act, awarding substantial damages (subject to a 15 percent reduction for respondent's contributory negligence). *Id.* at B7-B8. The court, however, rejected respondent's claim that the vessel was unseaworthy under the general maritime law, rendering judgment for petitioner on that issue. *Id.* at B8. The court held that petitioner was liable for maintenance and cure payments to respondent, virtually all of which had been paid to respondent prior to trial. *Id.* at B9.

Respondent moved for an award of prejudgment interest on the entire award, the damages under the Jones Act and the maintenance and cure under the general maritime law. Petitioner opposed that motion in substantial part, arguing that prejudgment interest was not available under the Jones Act, because of this Court's holdings that the Jones Act incorporates the substantive law of the Federal Employers' Liability Act (FELA) and that FELA does not authorize courts to

award prejudgment interest. See *Monessen Southwestern Railway Co.* v. *Morgan*, 486 U.S. 330, 336-339 (1988). Without citing or discussing *Monessen*, the district court awarded in excess of $144,000 in prejudgment interest. Pet. App. B9 (calculation based on award of damages). The court opined that, "[i]n admiralty cases, prejudgment interest must be awarded unless peculiar circumstances justify its denial." *Ibid.*

Petitioner appealed on the issues whether the damages award was excessive and whether the Jones Act authorized prejudgment interest. Respondent did not cross-appeal the district court's judgment that petitioner's vessel was seaworthy. The court of appeals rejected petitioner's contentions, holding that the award was not excessive and that it is "the norm" for a "court sitting in admiralty" to "award[] prejudgment interest." Pet. App. A2. The court did not address the applicability of *Monessen* to whether the Jones Act, properly construed, authorizes courts to award prejudgment interest. *Ibid.* Rather, it treated the matter as settled law under existing circuit precedent, citing *Simeonoff* v. *Hiner*, 249 F.3d 883, 894 (9th Cir. 2001), and *Vance* v. *American Hawaii Cruises, Inc.*, 789 F.2d 790, 794-795 (9th Cir. 1986). Pet. App. A2.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision incorrectly construes the Jones Act contrary to the manner dictated by this Court in *Monessen Southwestern Railway Co.* v. *Morgan*, 486 U.S. 330 (1988). In so doing, the court's holding deepens the disagreements among federal and state courts over whether the Jones Act authorizes courts to award prejudgment interest. By resolving the issue presented, the Court's decision would also bring clarity to related questions that have also divided the courts of appeals.

The question whether Congress intended in the passage of the Jones Act for prejudgment interest to be awarded is recurring and of enormous financial importance to the maritime industry.

I. THE COURT OF APPEALS' DECISION CANNOT BE RECONCILED WITH *MONESSEN*

A. The Jones Act incorporates the substantive law of FELA

1. The Jones Act provides that "[a]ny seaman who shall suffer personal injury in the course of his employment may * * * maintain an action for damages at law, * * * and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." 46 U.S.C. App. § 688(a). In its very first case construing the Jones Act, this Court held that this language refers to the FELA "and its amendments" and that Congress intended that language as "a recognized mode of incorporating one statute or system of statutes into another," thereby serving "to bring into the latter all that is fairly covered by the reference." *Panama Railroad Co.* v. *Johnson*, 264 U.S. 375, 391-392 (1924).

2. This Court's subsequent decisions confirm that Congress intended for the Jones Act to be construed to incorporate judicial decisions interpreting FELA. As the Court has explained, the Jones Act "adopts the entire judicially developed doctrine of liability under the Federal Employers' Liability Act (FELA)." *American Dredging Co.* v. *Miller*, 510 U.S. 443, 456 (1994) (quotation omitted).

The Court's decisions also establish that this incorporation is to be neutrally applied: if Congress intended for FELA to be construed to incorporate a legal

principle, then that principle also applies in Jones Act cases; but if FELA does not incorporate that principle, it is not incorporated into the Jones Act. Thus, this Court has confirmed that "[t]he Jones Act created a federal right of action for the wrongful death of a seaman based on the statutory action under the Federal Employers' Liability Act." *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 429 (1958). The Court has also held that "the Jones Act – which in terms incorporates the provisions of the FELA – permits recovery for the death of a seaman resulting from a violation of a statutory duty." *Id.* at 431. See also *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (stating that "the Jones Act makes applicable to seamen the substantive recovery provisions of the older FELA").

Conversely, when the FELA has *not* been construed to incorporate a judicial doctrine, as in the case of *forum non conveniens*, this Court has held that an action filed under the Jones Act also does not incorporate that principle. See *American Dredging*, 510 U.S. at 456 (holding that, because a state court is free under FELA "to decide the availability of the principle of *forum non conveniens* in these suits according to its own local law," the same rule should apply to Jones Act suits).

B. Prejudgment interest is not permitted under FELA

In *Monessen*, this Court squarely addressed "whether state courts may award prejudgment interest pursuant to local practice in actions brought under the FELA." 486 U.S. at 334. In holding that FELA does *not* authorize awards of prejudgment interest, the Court reasoned as follows. First, the Court explained that courts "are required to apply federal substantive law in adjudicating FELA claims." *Id.* at 335. The Court then

reasoned that the correct measure of damages is "'inseparably connected with the right of action,' and therefore is an issue of substance that 'must be settled according to general principles of law as administered in the Federal courts.'" *Ibid.* (quoting *Chesapeake & Ohio R. Co.* v. *Kelly*, 241 U.S. 485, 491 (1916)). Third, the Court concluded that prejudgment interest is properly considered "part of the actual damages sought to be recovered." *Ibid.* The Court rejected the notion that a rule of procedure could trump the application of substantive federal statutory law in determining the availability of prejudgment interest. *Id.* at 335-336.

The Court then analyzed whether Congress intended for courts to award prejudgment interest under FELA. 486 U.S. at 336-339. The Court noted that FELA was silent on the question of prejudgment interest, *id.* at 336-337, but explained that "a sufficiently clear indication of legislative intent" emerged from "Congress' silence on this matter in the appropriate historical context," *id.* at 337. The Court found that "[i]n 1908, when Congress enacted the FELA, the common law did not allow prejudgment interest in suits for personal injury or wrongful death." *Ibid.* (collecting cases and treatise authorities). The Court concluded, therefore, that "[i]f prejudgment interest is to be available under the FELA, then Congress must expressly so provide." *Id.* at 339.

C. There is no sound reason to construe the Jones Act differently than FELA with respect to prejudgment interest

1. Except when the maritime context otherwise dictates, Congress intended for injured seamen to receive the same types of remedies as injured rail workers. See *Kernan*, 355 U.S. at 439 (incorporating FELA into the

Jones Act to hold that an employer's violation of a statutory duty will give rise to liability to an injured seaman because "[t]he deceased seaman here was in a position perfectly analogous to that of the railroad workers allowed recovery in the line of cases we have discussed"). "[T]he Jones Act establishes a uniform system of seaman's tort law parallel to that available to employees of interstate railway carriers under FELA." *Miles*, 498 U.S. at 29.

2. This Court has emphasized that the maritime statutes creating remedies for death and injury should be construed to include only remedies intended by Congress. See, *e.g.*, *Dooley* v. *Korean Air Lines*, 524 U.S. 116, 123 (1998) (Death on the High Seas Act (DOHSA) "expresses Congress's judgment that there should be no such cause of action [for pre-death pain and suffering] in cases of death on the high seas"); *Miles*, 498 U.S. at 29 (holding that enactment of the Jones Act precludes seaman from recovering for loss of society in a wrongful death action); *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978) (DOHSA action can not be supplemented with additional recovery for loss of society under general maritime law); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 154-156 (1964) (Jones Act precludes recovery under a state statute for wrongful death of a seamen due to unseaworthiness because Congress did not include that remedy in the Jones Act); *Lindgren* v. *United States*, 281 U.S. 38, 44 (1930) (Jones Act preempts state law wrongful death action for person not a beneficiary under the Jones Act).

Similarly, the remedies recognized by statute in the Jones Act (and through FELA as incorporated into the Jones Act) do not support a claim for *any* type of damages; rather, the remedies include only those *measures* of damages contemplated by Congress. For

example, in a survival action created under the Jones Act, through the incorporation of FELA, "recovery is limited to losses suffered during the decedent's lifetime." *Miles*, 498 U.S. at 35 (citing *Van Beeck* v. *Sabine Towing Co.*,300 U.S. 342, 347 (1937); *St. Louis, I.M. & S. R. Co.* v. *Craft*, 237 U.S. 648, 658 (1915)).

3. Prejudgment interest is the type of legal remedy Congress contemplated and rejected for inclusion in the Jones Act and FELA when it enacted those statutes. In *Miles*, for example, the Court noted that Congress was aware of a pecuniary limitation on damages for loss of society under common law when it enacted FELA. "We assume that Congress is aware of existing law when it passes legislation," thus holding that "[t]here is no recovery for loss of society in a Jones Act wrongful death action." 498 U.S. at 32. Because Congress understood that prejudgment interest was not available at common law when it enacted the FELA, its incorporation of FELA into the Jones Act necessarily means that prejudgment interest may not be awarded under the Jones Act. See *Monessen*, 486 U.S. at 337. See also *Dooley*, 524 U.S. at 123 ("Because Congress has already decided these issues, it has precluded the judiciary from enlarging the class of beneficiaries or the recoverable damages.").

D. The Ninth Circuit's analysis is flawed

Although its discussion is cursory, the Ninth Circuit apparently views the availability of prejudgment interest as dependent on the nature of jurisdiction invoked by the plaintiff, and not on the substantive law of the Jones Act. That reasoning is flawed.

The court below (Pet. App. A2) rested its affirmance of the district court's award of prejudgment interest on prior Ninth Circuit decisions in *Simeonoff* v. *Hiner*, 249

F.3d 883, 893 (9th Cir. 2001), and *Vance* v. *American Hawaiian Cruises, Inc.*, 789 F.2d 790, 792 (9th Cir. 1986). Those cases, however, rely on the rule allowing prejudgment interest under the general maritime law, which is distinguishable from the context of awarding prejudgment interest under the Jones Act.

Under admiralty law, an award of prejudgment interest is the general rule, "subject to a limited exception for 'peculiar' or 'exceptional' circumstances." *City of Milwaukee* v. *National Gypsum Co.*, 515 U.S. 189, 195 (1995). That case, however, does not provide support for the Ninth Circuit's view that prejudgment interest may *also* be awarded in a Jones Act case, even if that action is brought under the court's admiralty jurisdiction. In holding that the general rule of maritime law allowed an award of prejudgment interest for the maritime collision claim at issue, the Court in *City of Milwaukee* noted that Congress "has enacted a statute governing the award of postjudgment interest in federal court litigation, see 28 U.S.C. § 1961, [but] there is no comparable legislation regarding prejudgment interest." *Id.* at 194. As the Court explained, "the absence of a statute merely indicates that the question is governed by traditional judge-made principles." *Ibid.* The Court then cited *Monessen* as support for the proposition that a congressional statute would supplant "judge-made principles." *Ibid.*

The Court's decision in *City of Milwaukee* did not rest on the jurisdictional basis for the court's authority to render judgment, but rather on the underlying substantive law giving rise to the cause of action for damages. That conclusion derives from two points stressed by the Court. First, *City of Milwaukee* (515 U.S. at 194) cited *Monessen*, which itself was unequivocal that prejudgment interest is a question of substantive

law. See 486 U.S. at 334-336. Second, the Court's discussion of the reasons for permitting prejudgment interest in admiralty cases rests on the substantive principles of admiralty law and not its jurisdictional requisites. See 515 U.S. at 194 ("admiralty decrees have included provisions for prejudgment interest"); *id.* at 195 ("general rule that prejudgment interest should be awarded in maritime collision cases").

Thus, this Court's decisions establish that, even though prejudgment interest may be awarded when a claim arises under the substantive law of admiralty, see *City of Milwaukee*, 515 U.S. at 195, prejudgment interest may *not* be awarded when the claim arises under the substantive law of a statute that does not authorize an award of prejudgment interest, see *Monessen*, 486 U.S. at 336. The jurisdictional basis of the court's power to issue a remedial decree simply has no bearing on whether the substantive law authorizes an award of prejudgment interest.

II. STATE AND FEDERAL COURTS CONFLICT OVER WHETHER THE JONES ACT AUTHORIZES THE AWARD OF PREJUDGMENT INTEREST

A. The Ninth Circuit's decision conflicts with the decisions of other courts foreclosing prejudgment interest under the Jones Act

1. The Ninth Circuit's decision directly conflicts with the longstanding rule in the Sixth Circuit that, "[w]ith respect to Jones Act cases, this Court has noted that in a seaman's action to recover for personal injury or death, the general rule is that interest is awarded from the date that the damages have been judicially determined, and not prejudgment interest from the date of injury."

Anderson v. *Whittaker Corp.*, 894 F.2d 804, 808 (6th Cir. 1990) (internal quotation marks omitted). The Sixth Circuit has consistently applied that rule even when the Jones Act claim is brought under the court's admiralty jurisdiction. See *Oglebay Norton Co.* v. *CSX Corp.*, 788 F.2d 361, 362 (6th Cir. 1986); *In re United States Steel Corp.*, 436 F.2d 1256, 1279 (6th Cir. 1970) (limitation of liability action brought in admiralty denying prejudgment interest for claimant's Jones Act claim); *Cleveland Tankers, Inc.* v. *Tierney*, 69 F.2d 622, 626 (6th Cir. 1948) (holding that the FELA rule that "an award of interest is not permitted prior to the judicial determination of damages * * * applies under the Jones Act"). Petitioner thus clearly would have prevailed if this case had been litigated in the Sixth Circuit.

2. After *Monessen*, a number of state courts have correctly analyzed the applicability of prejudgment interest as a question of substantive law, and not of the court's jurisdiction over the claim, and thereby held that prejudgment interest cannot be awarded in a Jones Act suit. In *Webster* v. *Oglebay Norton Co.*, 1995 Ohio App. LEXIS 238, at *19-*20 (Ohio App. 1995), for example, the Ohio court of appeals followed *Monessen* to hold that "the availability of prejudgment interest is a substantive matter governed by federal law" and "state courts cannot avoid the application of FELA [through incorporation into the Jones Act] by characterizing the state prejudgment statute as procedural rather than substantive." See also *Tio Mario, Inc.* v. *Matos*, 778 S.W.2d 529, 532 (Tex. Civ. App. 1989) (following *Monessen* to rule that trial court erred in awarding prejudgment interest under the Jones Act).

B. The jurisdiction-based approach has created conflicts among the federal courts on the applicability of prejudgment interest in Jones Act cases

1. The Fifth Circuit appears to be largely responsible for creating confusion on this issue by establishing a complex set of rules governing prejudgment interest that is triggered in part by the plaintiff's invocation of jurisdiction in Jones Act cases:

> Courts have generally recognized that the award of prejudgment interest may be appropriate in Jones Act cases tried in admiralty. *E.g., Sanford Bros. Boats, Inc. v. Vidrine*,412 F.2d 958, 972-73 (5th Cir. 1969). Further, when a Jones Act claim is tried jointly with a maritime claim before a judge, prejudgment interest may be awarded at the judge's discretion. *See Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191, 1196 (5th Cir. 1982). It is equally well established in this Circuit that prejudgment interest is not available in Jones Act cases tried at law. *Barrios v. Louisiana Construction Materials Co.*, 465 F.2d 1157 (5th Cir. 1972); *Vidrine*, 412 F.2d at 972-73.

Domangue v. *Penrod Drilling Co.*, 748 F.2d 999, 1000 (5th Cir. 1984) (per curiam). In articulating those "rules," however, the Fifth Circuit has not provided an explicable rationale for its holdings. Consequently, other courts have divided over the application of some of those rules, which has led to significant confusion among federal courts over when prejudgment interest may be awarded in a Jones Act suit.

2. Some courts hold that a seaman is not entitled to prejudgment interest in a Jones Act suit tried to a jury. See, *e.g.*, *Magee* v. *United States Lines, Inc.*, 976 F.2d 821, 822 (2d Cir. 1992); *Borges* v. *Our Lady of the Sea*

Corp., 935 F.2d 436, 443 n.1 (1st Cir. 1991); *Theriot* v. *J. Ray McDermott & Co.*, 742 F.2d 877, 883 (5th Cir. 1984). Those decisions appear to be based on a purported rationale that the plaintiff's request for a trial by jury negates his entitlement to prejudgment interest in a Jones Act suit. That explanation – that the case is being decided "at law" rather than "at admiralty," however, is merely a label for a result and not a coherent explanation of why the substantive law of the Jones Act logically depends on the forum where the case is tried.

Other courts – many from the same circuits as mentioned above – hold that prejudgment interest *is* authorized under the Jones Act when the suit is tried in admiralty. See, *e.g.*, *City of Boston* v. *S.S. Texaco Texas*, 773 F.2d 1396, 1401 (1st Cir. 1985); *Williams* v. *Reading & Bates Drilling Co.*, 750 F.2d 487, 491 (5th Cir. 1985) (stating that "it is well settled that in an action at law under the Jones Act, the recovery of prejudgment interest is not permitted, [but] the same rule does not apply to Jones Act cases brought under the court's admiralty jurisdiction") (citations omitted). Thus, in *Williams*, the court held that "when a Jones Act claim is brought under the court's admiralty jurisdiction, and hence the case is tried to the court and not to the jury, the allowance of prejudgment interest is within the discretion of the trial court even if there is not a finding of unseaworthiness." 750 F.2d at 491. See also *Williamson* v. *Western Pacific Dredging Corp.*, 441 F.2d 65, 67 (9th Cir. 1971). The Sixth Circuit rule conflicts with the holdings of those circuits and the court below (Pet. App. A2). See pp. 11-12, *supra*.

3. The inconsistency between those positions invites forum-shopping by plaintiffs and promotes confusion among courts, which exacerbates the difficulties of marine insurers and shipowners in allocating risks. In

suits with the types of claims brought by respondent in this case – a Jones Act claim and an unseaworthiness claim brought in the same action – two circuits hold that prejudgment interest is not permitted and one circuit holds that it is.

In *Wyatt* v. *Penrod Drilling Co.*, 735 F.2d 951, 953 (5th Cir. 1984), the Fifth Circuit explained that it was publishing its opinion "primarily to address * * * whether [the plaintiff] is entitled to prejudgment interest." Noting that problems were being "created by our somewhat conflicting precedents," *id.* at 956, the court in that case ruled that, when a plaintiff brings a case for Jones Act negligence and admiralty unseaworthiness, and the jury awards damages that cannot be differentiated between the two claims, a court may not award prejudgment interest, in view of the circuit rule "disapprov[ing] the award of prejudgment interest in a Jones Act tried to a jury," *id.* at 955. See also *Colburn* v. *Bunge Towing, Inc.*, 883 F.2d 372, 378 (5th Cir. 1989).

The Sixth Circuit, in this respect, is in accord with the Fifth Circuit. See, *e.g.*, *Anderson* v. *Whittaker Corp.*, 894 F.2d 804, 808 (6th Cir. 1990) (holding that because "[t]he jury's verdict does not disclose whether the damage award was based upon the Jones Act or upon the unseaworthiness claim" and "[w]here it is impossible to determine if the damages awarded relate only to the unseaworthiness claim, prejudgment interest will not be awarded at all") (quoting *Petersen* v. *Chesapeake & Ohio Ry. Co.*, 784 F.2d 732, 741 (6th Cir. 1986)).

In direct conflict with the Fifth and Sixth Circuits on this rule is the Second Circuit, which has held that when a plaintiff is awarded damages for a Jones Act claim along with an unseaworthiness claim, a court may award prejudgment interest. Indeed, the Second Circuit

has explicitly acknowledged a conflict on this issue. See, *e.g.*, *Magee*, 976 F.2d at 822 ("with all due respect for our learned colleagues in these two circuits [Fifth and Sixth], we reach a different conclusion in the instant case").[2]

4. The judicial confusion over when a court may award prejudgment interest for a Jones Act claim is compounded still further by the vagaries of litigation. A Fifth Circuit case illustrates the conundrums faced by injured seamen, shipowners, and insurers alike. In *Martin* v. *Walk, Haydel & Associates, Inc.*, 794 F.2d 209 (5th Cir. 1986) (per curiam), a dredging inspector was injured while stepping off a barge and onto a flatboat. After settling with one party, the plaintiff abandoned his original request for a jury trial. The case proceeded with findings of negligence and unseaworthiness against the inspector's employer and negligence against the flatboat operator. The court of appeals reversed as to employer's unseaworthiness and as to the flatboat operator's negligence, but affirmed on the employer's negligence

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[2] This Court's proper resolution of the question presented – whether a court may award prejudgment interest under the substantive law of the Jones Act – would also shed light on the proper rule to apply with respect to the unapportioned damages issue as well. If the Court were to rule, as petitioners and *amici* urge, that prejudgment interest may not be awarded under the Jones Act, there would be no legal basis for the Second Circuit's rule that such interest may be awarded when such an award is combined with a claim for unseaworthiness. See, *e.g.*, *Miles*, 498 U.S. at 24 (holding that, when the Jones Act addresses an issue, the general maritime law cannot provide a supplemental remedy as to that issue). Conversely, if this Court were to agree with respondent that the Jones Act permits prejudgment interest to be awarded, then the Fifth and Sixth Circuit rules prohibiting such interest in cases with combined Jones Act and unseaworthiness claims would be insupportable.

and remanded the case for reapportionment of fault and an appropriate reduction of the judgment. The remand order was silent as to prejudgment interest. *Id.* at 210. On remand, the district court found the liability for unseaworthiness and negligence to have been equal, dismissed the flatboat operator, and entered an award for damages and prejudgment interest against the seaman's employer. *Ibid.* On appeal again, the Fifth Circuit addressed only the issue of prejudgment interest. The court recalled its prior mandate, held that the plaintiff's decision to forego a jury trial in mid-litigation vested the district court with discretion to award prejudgment interest (as the case was now in admiralty), and then held that the district court had improperly awarded prejudgment interest as to future damages, which was not permitted under circuit law. *Id.* at 211-212. For the reasons stated above, however, that decision is incorrect. See pp. 5-11, *supra*.

A recent Second Circuit provides another illustration of how the vagaries of procedure have been held to affect the award of prejudgment interest. In *Jones* v. *Spentonbush-Red Star Co.*, 155 F.3d 587, 593 (2d Cir. 1998), the court upheld a district court's decision not to exercise its discretion to award prejudgment interest based on the delay of plaintiff in bringing the lawsuit – nearly three years after the injury but still within the statute of limitations period.

As the foregoing cases and those cited throughout Part II confirm, ship operators and their insurers face liability for prejudgment interest in Jones Act suits in some courts if the injured seaman (a) sues in admiralty; (b) abandons his request for a jury in mid-litigation and proceeds with an admiralty action; or (c) combines his Jones Act claim with an unseaworthiness claim and prevails on both. They do not face liability for

prejudgment interest in Jones Act suits in some courts if the injured seaman (a) sues in federal court and seeks a jury trial; (b) sues in state court under the Jones Act and invokes state procedural rules to obtain prejudgment interest; (c) delays too long in bringing suit; (d) sues in federal court on the law side, combines his Jones Act and unseaworthiness claims, and the jury cannot reasonably differentiate between the two in assessing damages; or (e) sues in the Sixth Circuit, where the court has properly held that prejudgment interest may not awarded under the Jones Act as a matter of substantive law.

That state of the law is flatly inconsistent with this Court's admonition that "prejudgment interest constitutes too substantial a part of a defendant's potential liability" to be left to the vagaries of a "rule of procedure." *Monessen*, 486 U.S. at 336. As the Fifth Circuit aptly put it, "[t]o make prejudgment interest depend on the route by which a plaintiff arrived in federal court is to confuse jurisdiction with remedy in a way no longer accepted in other areas of the law." *Snyder* v. *Whittaker Corp.*, 839 F.2d 1085, 1095 (5th Cir. 1988). This Court should grant certiorari to clarify the proper rule to be applied in Jones Act cases.

III. THIS CASE PRESENTS A RECURRING AND IMPORTANT ISSUE TO THE MARITIME INDUSTRY

A. There is no need for this Court to allow further "percolation"

As set forth in Part II, the conflicting approaches and confusion among the lower courts over when prejudgment interest may be awarded in a Jones Act suit are longstanding. The lower courts should have, but

did not, appreciate this Court's decision in *Monessen* as providing the requisite guidance. Numerous decisions after *Monessen* have continued to hew to the pre-existing circuit approaches. See, *e.g.*, *Simeonoff*, 249 F.3d at 894; *Jones*, 155 F.3d at 593; *Magee*, 976 F.2d at 822-823; *Borges*, 935 F.2d at 443 n.1; *Anderson*,894 F.2d at 808; *Jones* v. *Pool Offshore Co.*, 893 F.2d 713, 719-720 (5th Cir. 1990). Those decisions make clear that the prevailing circuit confusion is simply being entrenched or extended.

B. The issue is of great importance to the maritime industry

This Court has made clear that the Jones Act "establishes a *uniform* federal law that state as well as federal courts must apply to the determination of employer liability to seamen." *American Dredging*, 510 U.S. at 455 (emphasis added). That uniformity, which provides crucial assurance to the maritime industry, is completely unsettled by a legal regime that hinges the payment of awards for prejudgment interest on the vagaries of where a case arises, how a plaintiff invokes jurisdiction in the complaint, or how the case proceeds through litigation. The conflicting approaches of the Second, Fifth, Sixth, and Ninth Circuits embrace the major sea ports of the United States and river traffic along the Mississippi River.

Although the *amici* do not keep specific records on the amount of claims paid for Jones Act cases, they can represent to this Court that approximately 25 percent of all insured claims in any given year will be paid for crew member personal injuries, with a total exposure into the tens of millions of dollars annually. Interests represented by the *amici* thus face uncertain consequences on a large scale depending on where an

injured seaman might choose to bring suit. For many of the *amici* operating in the coastal trade and which routinely call into ports from different judicial circuits on the same voyage, that uncertainty creates an arbitrary and wholly irrational application of the law. Such uncertainty has particularly large consequences when, as this Court has recognized, "prejudgment interest may constitute a significant portion of [a Jones Act] plaintiff's total recovery" – as in *Monessen*, increasing the total recovery "by more than 20 percent." 486 U.S. at 335.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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